

NO. 87-1183

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

CELOTEX CORPORATION; EAGLE-PICHER
INDUSTRIES, INC., OWENS-CORNING
FIBERGLASS CORPORATION; KEENE CORPORATION;
H.K. PORTER COMPANY, INC.; FIBREBOARD
CORPORATION,

Petitioners,

v.

WILEY GOAD,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

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February 12, 1988

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CELOTEX CORPORATION, et al.

Petitioners,

v.

WILEY GOAD,

Respondent.

BRIEF IN OPPOSITION OF RESPONDENT WILEY GOAD

In the usual course, we would, on behalf of Respondent Goad, vigorously oppose certiorari in this case. The decision of the Fourth Circuit is clearly right and consistent with an unbroken line of decisions from this Court going back to 1839 as well as with what has been regarded as settled law by courts throughout the land.

Even the contrary decision of the Third Circuit in *Ferens v. Deere & Co.*, 819 F.2d 423 (3d Cir. 1987), *petition for certiorari pending*, No. 87-477, would not alter the fact that this case is not worthy of certiorari. There is a square conflict between the decision below in this case and that in *Ferens*. Indeed the Fourth Circuit made it clear in note 17 of its opinion, 831 F.2d at 514 (A-10), that it was not following the divided decision of a panel of the Third Circuit. That two judges of the Third Circuit saw fit to write into the

Constitution their own notions on what they think would be wise conflicts-of-laws policy is hardly reason for this Court to hear a case. Either *Ferens* should be summarily reversed or perhaps left to dangle in the wind as the derelict it so clearly is.

The situation is changed only because the Court has already agreed to hear *Sun Oil Co. v. Wortman*, No. 87-352, *certiorari granted* 108 S.Ct. 256 (1987). We understand that the *Sun Oil* case is scheduled for argument on March 22, 1988.


The views of Respondent Goad have already been set out in an amicus curiae brief in *Sun Oil*, dated January 19, 1988. As we explain at some length there, the issue in *Sun Oil* is certainly similar to that in the present case, but the two issues are not the same. If this Court should affirm the holding of the Kansas Supreme Court in *Sun Oil* with regard to the statute of limitations, a similar result in our case is *a fortiori*. But if the Court should reverse in *Sun Oil*, it does not follow that there must be reversal here. There is considerable difference between a suit by royalty owners to recover money, which could have been brought at any time, and a personal injury case such as Goad's, in which application of the Virginia statute of limitations arguably means that his claim for damages for the terrible harm done him was barred by limitations before he knew or could have known that he had a claim. Even if the Constitution should suddenly be found to restrain a forum state from applying its own statute of limitations in the circumstances of the *Sun Oil* case, the Constitution should not be held a draconian bar where basic considerations of fairness argue against depriving an injured person of any day in court. See, for example, the views of the National Conference of Commissioners on Uniform State Laws, set out at pages 28-29 of our amicus brief.

The Court may, therefore, wish to defer action on the petition for certiorari in the present case until *Sun Oil* has been decided. If that case is affirmed, either summary affirmance or denial of certiorari would seem appropriate for the present case, with *Ferens* either summarily reversed or remanded to the Third Circuit for reconsideration in the light of *Sun Oil's* reminder that the Constitution does not reflect every changing fancy of the conflicts scholars. If *Sun Oil* should be reversed on the statute of limitations issue, presumably the present case should be remanded for reconsideration by the Fourth Circuit in the light of that decision.

It may be that the Court will wish to have before it the full range of possibilities concerning the Constitution and statutes of limitations at the time it hears *Sun Oil*. If that is its preference, it would seem desirable to grant certiorari in the present case and hear argument in the two cases in tandem. There is no reason why consolidation need cause delay. For our part, if consolidation should be ordered, we are prepared to file our brief on the merits within seven days after receipt of the brief of Petitioners.

Respectfully submitted,

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